Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:NR:DEN:POSTF-119730-02
WRDavis

date:

to: Team Manager, LMSB-CTM, Group 1294
Attn: Gloria Schoengarth

from: Area Counsel
(Natural Resources:Houston)

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subject: **Request for LMSB Division Counsel Assistance: [redacted] Corp. (EIN [redacted]) - Consent to Extend Statute of Limitations for Taxable Years ended Nov. 1, [redacted], Oct. 31, [redacted], and short taxable year ended [redacted]**
Address: c/o [redacted]

This memorandum responds to your request for assistance seeking our opinion as to the proper parties and language to include on a consent to extend the statute of limitations on assessment for [redacted] Corp. ("[redacted]" or "taxpayer"), for the taxable years ended November 1, [redacted], October 31, [redacted] and for the short taxable year beginning on November 1, and ended on [redacted]. This memorandum should not be cited as precedent.

Please note that, as nondocketed significant advice, this memorandum is subject to a 10-day post-review by Chief Counsel National Office. Once this review has been completed, we will contact you to advise of its acceptance upon review, or of any modifications to the proposed response.

DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney-client privilege. If disclosure becomes necessary, please contact this office for our views.

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ISSUES

1. Who is the proper party to agree to, and what is the correct wording of a consent to extend the statute of limitations upon assessment of income tax for [redacted] for its taxable years ended November 1, [redacted], October 31, [redacted], and its short taxable year beginning November 1, [redacted], and ended on [redacted] (taxable years at issue)?

2. Is [redacted] Corp. a transferee of [redacted]? If so, what language, if any, should be added to Form 977, Consent to Extend the Time to Assess Liability at Law or in Equity for Income, Gift and Estate Tax Against a Transferee or Fiduciary, to extend the statute for [redacted]'s taxable years at issue? May the person named as an attorney-in-fact by [redacted] under a power of attorney executed prior to [redacted]'s merger into [redacted] extend the transferee liability statute of limitations?

CONCLUSIONS

1. [redacted], Inc. ("[redacted]"), as successor by merger to [redacted], can extend the statute of limitations for assessment and collection for [redacted]'s tax years at issue. The caption on page 1 of the Form 872[1] should read:

> [redacted], Inc. (EIN xx-xxxxxxx), as successor by merger to [redacted] Corp. (EIN [redacted]).*

Put an asterisk after the EIN for [redacted]. At the bottom of the Form 872, include the following language:

> * This is with respect to the federal income tax of [redacted] Corp. (EIN [redacted]) for its taxable years ended November 1, [redacted], October 31, [redacted], and the short taxable year beginning November 1, [redacted], and ended [redacted].

Also, use the EIN for [redacted] in the upper right-hand corner of the form as the Taxpayer Identification Number.

We further remind you that you must notify the taxpayer (in this case, [redacted]) of its right 1) to refuse to extend the period of limitations, or 2) to limit the extension to a particular

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[1] Use of the corporate Form 872-I if [redacted] was in a TEFRA partnership for any of the taxable years at issue.

issue, or 3) to limit the extension to a particular period of time. Further, it is suggested that you secure consents to extend statutes of limitation by sending Letter 907(DO). In addition, you should provide the taxpayer with Publication 1035.

2. Based upon the facts as we now know them, [redacted] Corp. does not qualify as a transferee of [redacted] because it has received no transfer of assets from [redacted]. You may wish to further explore the net value of assets and liabilities that were distributed to [redacted] by [redacted] prior to its sale of [redacted] stock to [redacted], to see if [redacted] is a transferee of [redacted]'s property.

While [redacted] is primarily liable, it also appears to be a transferee at law of [redacted]. If you wish, in addition to treating [redacted] as being primarily liable for [redacted]'s tax as a result of the merger of [redacted] into [redacted], you may also treat [redacted] as liable for [redacted]'s liability as a transferee.

FACTS

Corporate income tax returns were filed for [redacted] Corp., EIN [redacted] ("[redacted]"), for its taxable years ended November 1, [redacted], October 31, [redacted], and the short taxable year beginning November 1, [redacted], and ended [redacted]. The short taxable year was precipitated by [redacted]'s entry into the [redacted] Corporation consolidated group on the next day. [redacted] was, at all times relevant, a Colorado corporation.

Sale of [redacted] stock to [redacted]

On [redacted], [redacted] Corporation, a [redacted] corporation ("[redacted]") purchased all of [redacted]'s capital stock from two individual stockholders, [redacted] and [redacted] ("Sellers"). As part of the same transaction, Sellers assigned certain specified patents to [redacted] pursuant to a license agreement. Section [redacted] of the "Stock Purchase Agreement by and Among [redacted] Corporation and [redacted] Corporation, [redacted] and [redacted]" defines the license agreement as the agreement between Sellers and [redacted] granting [redacted] an exclusive license to use the Patents and an option to purchase the Patents, and contained an exhibit showing the form of that licence agreement.

Our review of the Stock Purchase Agreement finds no indication that any property was transferred from [redacted] to any other party as a part of agreement. [redacted] retained its corporate existence during the entire period during which [redacted] owned the stock of [redacted].

Sale of [redacted] stock to [redacted]

On [redacted], [redacted] sold all of [redacted]'s capital stock, and all of the capital stock of [redacted] Corp., a [redacted] corporation ("[redacted]"), to [redacted], Inc., a Delaware corporation. The "Stock Purchase Agreement By and Between [redacted] Corporation and [redacted] Inc.," reflected only minor effects on [redacted]. Specifically, section [redacted] of the agreement called for the distribution by [redacted] (and [redacted] of several assets to [redacted] prior to consummation of the stock sale, the following of which may have been owned by [redacted]:

[redacted]

It appears that [redacted] did not have a pension plan in place as of the time of the transaction. We are unaware of the value placed on any of these assets by the parties.

Additionally, section [redacted] of the agreement called for the assumption by [redacted] of several liabilities of [redacted] and [redacted] before the stock sale, the following of which were liabilities of [redacted]:

[redacted]

Here, again, we are unaware of the value placed on any of these liabilities by the parties. Other than the transfers identified above, we did not see anything in the agreement that reflected any transfer of [redacted]'s assets to [redacted], or to any other person, as part of the agreement by which [redacted] acquired [redacted] from [redacted].

The agreement also set forth that, with exceptions, [redacted]'s agreement to be responsible for, and to hold harmless, (1) [redacted], (2) [redacted], and (3) [redacted] for federal income tax of [redacted] and [redacted] not paid (and to be entitled to reductions in tax not received) for taxable periods ending on or before the closing date for the stock sale to [redacted]. The agreement further reflects the seller's and buyer's agreement to join in making an election under I.R.C. § 338(h)(10) which, if effective, treats the target corporation ([redacted]) as a member of the selling consolidated group with respect to the deemed sale of all of the target's assets under I.R.C. § 338(a), and results in no gain or loss recognition by the selling consolidate group ([redacted]). Section [redacted] of the agreement provides for the buyer's payment of tax resulting from an election to have I.R.C. § 338 apply in the event that no effective election under I.R.C. § 338(h)(10) is made. Assuming that the transaction was a deemed sale under I.R.C. § 338, the gain or loss would have been realized by the [redacted] consolidated group for its tax year including the sale date, <u>not</u> in any of the taxable years at issue.

Finally, section [redacted] makes the law of [redacted] the governing law of the agreement. Nothing in the agreement reflected any plan to merge [redacted] (or [redacted]) into [redacted], or any subsidiary thereof.

The file contains a copy of Form 2045, Transferee Agreement, executed by an Assistant Secretary for [redacted], whereby [redacted],

[redacted]

Merger of [redacted] into [redacted]

By [redacted][2], [redacted] merged with and into [redacted], Inc., in a statutory merger pursuant to the provisions of the Colorado Business Corporations Act, a transaction qualifying as a reorganization under I.R.C. § 368(a)(1)(A). Upon completion of the merger, the separate existence of [redacted] ceased, leaving [redacted] as the surviving corporation. Contained within the Articles of Merger and the Certificate of Ownership was the following:

[redacted]

Prior Statute Extensions/Powers of Attorney

It is our understanding that prior to the merger of [redacted] into [redacted], an officer of [redacted] signed a Form 872 extending the statutes for each of the taxable years at issue to [redacted]. **We ask that you confirm this by contacting us.** On [redacted], [redacted] named [redacted] an [redacted] as attorneys-in-fact for its income tax matters for the tax year ended October 31, [redacted], and the short taxable year ended [redacted]. On [redacted], it had named the same individuals as attorneys-in-fact for the tax year ended November 1, [redacted]. Prior to that, on [redacted], [redacted] had named [redacted] as an attorney-in-fact for the [redacted] tax year, a power which [redacted] elected to keep in effect on the subsequent power.

ANALYSIS

1. Generally, I.R.C. § 6501(a) limits assessment of income tax to the period ending three years after the return for that tax period is filed. Under one of the exceptions to this three-year rule, the consent of both the Service and the taxpayer, in

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[2] We note, in your write-up of the facts, the merger date reflected as [redacted]. The file includes a copy of a Certificate of Ownership from the office of the Delaware Secretary of State. That document shows the effective date of the certificate, which merged [redacted], [redacted] Company, and [redacted], Inc., with and into [redacted], as [redacted]. We obtained the [redacted], date, from the Articles of Merger that we obtained from the Colorado Secretary of State web site (copy attached).

writing, to an extension of this period for assessment will extend this period when such an agreement is executed before the expiration of the assessment period. I.R.C. § 6501(c)(4).

IRM 25.6.22.3 sets forth the notification procedures that the Service must follow on each occasion when the taxpayer is requested to extend the statute by consent. This provision requires that the notification must be made to the taxpayer by sending or presenting Letter 907(DO), and sending or presenting Publication 1035. See IRM 25.6.22.3(2).

I.R.C. § 6061 provides that any return, statement, or other document made under any internal revenue laws must be signed in accordance with the applicable forms and regulations. The regulations under I.R.C. § 6501(c)(4) do not specify who may sign consents. Accordingly, the Service will apply the rules applicable to the execution of the original returns to the execution of consents to extend the time to make an assessment. Generally, I.R.C. § 6062 provides that a corporation's income tax returns must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. Accordingly, any such officer may sign a consent, whether or not that person was the same individual who signed the return. Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

The validity of a consent to extend the statute of limitations on assessment by agreement between the parties, at least as to the capacity of party to execute it, is governed by state law. See Sanderling, Inc. v. Commissioner, 66 T.C. 743, 750 (1976), aff'd, 571 F.2d 174 (3d Cir. 1978) (validity of consent for dissolved corporation is based upon state law); Lesser v. Commissioner, 47 T.C. 564, 591 (1967) (validity of waiver must be determined under the laws of state where it was executed).

In the present case, [redacted] the corporation into which [redacted] merged, was a Delaware corporation, while [redacted] was a Colorado corporation. Based upon our review of applicable laws regarding merger of either state, [redacted] became primarily liable for the tax liabilities of [redacted] upon completion of the merger.

With respect to the liabilities of constituent and surviving or resulting corporations, Del. Code Ann. tit. 8, § 259(a) (2001) provides as follows:

> When any merger or consolidation shall have become effective under this chapter, for all purposes of the laws of this

> State, the separate existence of all the constituent corporations, or of all such constituent corporations except the one into which the other or others of such constituent corporations have been merged, as the case may be, shall cease and the constituent corporations shall become a new corporation, or be merged into 1 of such corporations, . . . but all rights of creditors and all liens upon any property of any of said constituent corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

Under these provisions, the separate existence of [redacted] ceased when all of the requisite formalities of the merger had been completed, at which time [redacted], as surviving corporation, took all of the rights and assumed all of the obligations of [redacted] as its own. The Certificate of Ownership and Plan of Merger each contain similar language reflecting [redacted]'s assumption of [redacted]'s liabilities.

As was succinctly stated in Fitzsimmons v. Western Airlines, Inc., 290 A.2d 682, 685 (Del. Ch. 1972):

> It is thus a matter of statutory law that a Delaware corporation may not avoid its contractual obligations by merger; those duties "attach" to the surviving corporation and may be "enforced against it." In short, the survivor must assume the obligations of the constituent.

If Delaware law controls, then the obligations of [redacted] automatically attached to its successor, [redacted], upon merger, and [redacted] is primarily liable for [redacted]'s tax liabilities. Rem Indus., Inc. v. Commissioner, T.C. Memo. 1974-123, aff'd without opinion, 529 F.2d 516 (4th Cir. 1975).

Colorado statutes provide for similar treatment with respect to a merger:

> When a merger takes effect:
>
> (a) Every other corporation party to the merger merges into the surviving corporation and the separate existence of every corporation party to the merger except the surviving corporation ceases . . . ;

> (c) The surviving corporation has all liabilities of each corporation party to the merger;
>
> (d) A proceeding pending against any corporation party to the merger may be continued as if the merger did not occur or the surviving corporation may be substituted in the proceeding for the corporation whose existence ceased. . . .

Colo. Rev. Stat. § 7-111-106(1) (2001).

This provision has been interpreted as vesting the "successor" to a corporation as becoming invested with the rights and assuming the burdens of the corporation and which is thereafter responsible for all debts, liabilities and duties of the corporation, and to be successor, in all material respects, standing in the shoes of the old corporation. In re Stanley Hotel, Inc., 13 B.R. 926 (Bankr. D. Colo. 1981). In Johnston v. Armsted Indus., Inc., 830 P.2d 1141 (Colo. App. 1992), the court explained a similar Colorado law regarding mergers as follows:

> [I]n a merger, the liability of the predecessor corporation necessarily becomes that of the successor. See Colo. Rev. Stat. § 7-7-105(2)(e) (1986 Repl.) [predecessor to current statute] (the surviving or new corporation shall "be responsible and liable for all the liabilities and obligations of each of the corporations so merged or consolidated"). This is so, in part, because it is the shareholders that ultimately enjoy the profits, if any. Therefore, they cannot move as a group to another corporation to enjoy the continuing profits of the same business earned before merger but escape all possible losses that accumulated before the merger.

Id., 830 P.2d at 1147. E.g., Scott v. Sopris Imports Ltd., 962 F. Supp. 1356 (D. Colo. 1997); Alcan Aluminum Corp. v. Electronic Metal Prod., Inc., 837 P.2d 282 (Colo. App. 1992).

Taxes are debts or liabilities of a corporation. Scott v. United States, 167 F.2d 301 (8th Cir. 1948). Since [redacted] became primarily liable for the tax liabilities of [redacted] after the merger under either Delaware or Colorado law, it has the power to extend the period of limitations for its own direct liability, just as its predecessor, [redacted], would have had. See Union Bleachery v. Commissioner, 97 F.2d 226, 228 (4th Cir. 1938); Pleasanton Gravel Co. v. Commissioner, 85 T.C. 839, 853 (1985); Popular Library, Inc. v. Commissioner, 39 T.C. 1092, 1099 (1963); Rev. Rul. 59-399, 1959-2 C.B. 488. Consequently, [redacted] should execute the consent to extend the statute of limitations for [redacted]'s liabilities for the taxable years at issue.

We recommend that you submit the consents to one of the authorized officers of [redacted] identifying the taxpayer on the Form 872 as [redacted], Inc. (EIN xx-xxxxxxx), as successor by merger to [redacted] Corp. (EIN [redacted]).*

Put an asterisk after the EIN for [redacted]. At the bottom of the Form 872, include the following language:

> * This is with respect to the federal income tax of [redacted] Corp. (EIN [redacted]) for its taxable years ended November 1, [redacted], October 31, [redacted], and the short taxable year beginning November 1, [redacted], and ended [redacted].

Also, use the EIN for [redacted] in the upper right-hand corner of the form as the Taxpayer Identification Number.

We further remind you that you must notify the taxpayer (in this case, [redacted]) of its right 1) to refuse to extend the period of limitations, or 2) to limit the extension to a particular issue, or 3) to limit the extension to a particular period of time. Further, it is suggested that you secure consents to extend statutes of limitation by sending Letter 907(DO). In addition, you should provide the taxpayer with Publication 1035.

2. I.R.C. § 6901 describes transferee liability as the "liability at law or in equity" of a transferee of property of a taxpayer liable for income taxes. The elements necessary to establish liability at law or in equity are different, except for two common points. First, there must be a transfer of property of the taxpayer to another person or entity. Second, the taxpayer-transferor must be liable for a tax both at the time of the transfer and at the time transferee liability is asserted.

[redacted] as Transferee

Your request seeks advice as to obtaining a consent to extend the transferee liability statute and the validity of a Form 2045, Transferee Agreement, executed by an Assistant Secretary for [redacted]. Under the facts as we presently understand them, [redacted] cannot be held liable for [redacted]'s tax liability as a transferee because it has not received a transfer of assets from [redacted]. However, pending disposition of this matter, please safeguard this form, in as much as further factual development may show it to be significant.

On [redacted], [redacted] and [redacted] completed a transaction by which [redacted] acquired all outstanding shares of [redacted] stock and [redacted] stock from [redacted] for $[redacted]. Other than the assignment of excluded assets to, and the assumption of excluded liabilities by [redacted] that section [redacted] of the agreement required, the net value of which is unknown, nothing of value was transferred by [redacted] to [redacted]. Its agreement to hold [redacted] harmless for [redacted]'s tax liabilities notwithstanding, the facts as known show that [redacted] took nothing from [redacted], and is thus, not a transferee of [redacted]. S. Ariz. Bank & Trust Co. v. United States, 386 F.2d 1002, 1006 (Ct. Cl. 1967).

We do not believe that [redacted]'s agreement to be responsible for [redacted]'s tax liabilities and to hold [redacted] harmless for same provides a valid basis for asserting transferee liability. In Coca-Cola Bottling Co. v. Commissioner, 37 T.C. 1006 (1962), aff'd, 334 F.2d 875 (9th Cir. 1964), the Service sought to collect unpaid taxes of a dissolved corporation--Crystal--from its successor, the petitioner in that case (Bottling). The shareholders of Bottling had purchased the shares of Crystal from Martin and had obtained an indemnity right against Martin for Crystal's tax liabilities. Thereafter, Bottling's shareholders contributed the Crystal shares to Bottling, and Crystal was dissolved.

Bottling contended that the Service could not seek collection against it as a transferee of Crystal without first exhausting attempts to collect from Martin under the indemnity agreement. The court rejected this argument as entirely without merit, pointing out that Martin had received nothing from Crystal, and that the complete liquidation and dissolution of Crystal by Bottling had caused Bottling to become liable as a transferee. Id., 37 T.C. at 1012-1013.

Should you obtain an extension of the assessment statute, or obtain information that discloses a significant transfer of assets from [redacted] to [redacted] prior to the [redacted] stock sale, you may wish to consider asserting transferee liability against [redacted]. Note that I.R.C. § 6901(c)(1) provides that the statute of limitations for asserting transferee liability against the initial transferee expires one year after the expiration of the assessment statute for the transferor.

If you obtain additional information showing that [redacted] did receive a transfer of assets from [redacted], you cannot rely on the power-of-attorney forms executed for [redacted] prior to its merger into [redacted]. Under the usual rules of agency, a power of attorney terminates upon the death or incapacity of the principal. Malone & Hyde, Inc. v. Commissioner, T.C. Memo. 1992-661. Because of this, the Forms 2848 for [redacted] are invalid.

Should [redacted] wish to appoint a person to act concerning its liability as a transferee of [redacted] the form must identify these as the matters to which the power extends. Feel free to contact us should you want assistance in preparing such a form.

[redacted] as Transferee

In order to establish transferee liability at law, the Service must prove that a basis in law exists for holding a transferee liable for a transferor's tax obligation. This can take the form of either an obligation under the law, such as I.R.C. § 6324(a)(2) imposes on transferees of estates, or a valid contact between the taxpayer-transferor and the transferee. Under the terms of such a contract, the transferee must assume the obligation to pay the taxes of the transferor. See Bos Lines, Inc. v. Commissioner, 354 F.2d 830 (8th Cir. 1973); W. Tex. Ref. & Dev. Co. v. Commissioner, 68 F.2d 77 (10th Cir. 1933).

In a merger or consolidation, the surviving corporation may be subjected to transferee liability, usually as a transferee at law, for the Federal income tax liability of the merged corporation. For this to apply, the Service must show that the surviving corporation, expressly or by operation of State law, assumed the liabilities of the merged corporation. Harder Servs., Inc. v. Commissioner, 67 T.C. 585, 598-599 (1976), aff'd, 573 F.2d 1290 (2d Cir. 1977). See also Eddie Cordes, Inc. v. Commissioner, T.C. Memo. 2001-265; Texsun Supply Corp. v. Commissioner, 17 T.C. 433, 442 (1951); Turnbull, Inc. v. Commissioner, T.C. Memo 1963-335, supplemented by 42 T.C. 582 (1964), aff'd, 373 F.2d 91 (5th Cir. 1967).

Some courts have found that subsequent to a merger, the survivor is only primarily liable for the liabilities of the constituent corporations, so that the extended statute of limitations where transferee liability is asserted does not apply. In Commissioner v. Oswego Falls Corp., 71 F.2d 673 (2d Cir. 1934), the court held that the corporation resulting from the consolidation of three other corporations was primarily liable for any tax deficiencies of the consolidating corporations under New York law, and therefore was not, under state law, subject to transferee liability. Id., 71 F.2d at 676; see also Saenger v. Commissioner, 38 B.T.A. 1295 (1938) (The corporation resulting from a consolidation of three corporations under Louisiana law was directly and primarily liable for the predecessor corporations' tax deficiencies as a taxpayer rather than as a transferee). However, this view may not still prevail, and clearly does not apply where the surviving corporation expressly assumes the merged corporation's liabilities.

In Southern Pacific Transp. Co. v. Commissioner, 84 T.C. 367 (1985), the Tax Court held that the Delaware corporation law was like the New York law construed in Oswego Falls, so that under Delaware law, the successor corporation in a merger is primarily liable for the debts of the disappearing corporation. However, the Tax Court held that it is possible to be both primarily liable and, at the same time, liable as a transferee. The court pointed out that Southern Pacific Transportation, the successor and proposed transferee, had contractually obligated itself to pay the liabilities of the disappearing corporation in the merger agreement. In contrast, the merger agreement in Oswego Falls contained no such provision. As a result, the transferee liability statute applied, and the Service's notice of transferee liability was timely because there was an additional year to send it to the petitioner-transferee under I.R.C. § 6901. S. Pac. Transp., 84 T.C. at 373-374.

Here, [redacted] expressly assumed the liabilities and obligations of [redacted], among other companies, in the merger agreement. Thus, we believe that the merger agreement would support a finding of [redacted] as a transferee, as well as being primarily liable for [redacted]'s tax liabilities.

We do not believe that obtaining a consent to extend the transferee liability statute against [redacted] provides more than minimal additional protection. However, should you wish to exercise an abundance of caution, you can treat [redacted] as a transferee of [redacted]'s tax liabilities, as well, and seek Forms 977 and Forms 2045 from it. Each form should identify [redacted] Corporation as the transferor and [redacted], Inc., as the transferee.

Any Forms 977 obtained should contain an extension date that is more than one year later than the extended assessment statute expiration date for the corporation. By statute, the Service has the right to assess the transferee liability up to one year after the statute of limitations against the party that is primary liable expires. Therefore, an extension to the same date as the Form 872 or to any date not beyond the same date plus one year is meaningless.

Please do not hesitate to contact the undersigned if you need further assistance concerning this matter, at (303) 844-2214, ext. 259.

BERNARD B. NELSON
Area Counsel
(Natural Resources:Houston)

By:______________________
WILLIAM R. DAVIS, JR.
Attorney (LMSB)

Attachment